
NO. 87-1221

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE STATE OF MISSISSIPPI,

PETITIONER,

versus

MARK ANTHONY PARKER,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEY FOR THE RESPONDENT

238

QUESTION PRESENTED FOR REVIEW

The State of Mississippi, the Petitioner herein, poses the question does Chambers v. Mississippi, 410 U.S. 284 (1973), require reversal of a conviction in a case in which the excluded hearsay statement is not shown to be trustworthy and is in fact, made under circumstances which severely undermine confidence in its reliability?

TABLE OF CONTENTS

	<u>PAGE</u>
Question Presented for Review.....	i
Table of Contents.....	ii
Table of Authorities.....	iii
Statement of the Case.....	1
Argument.....	4-7
Conclusion.....	8
Certificate of Service.....	9
Affidavit of Mailing.....	10
Appendix A:.....	A-1-3
Appendix B:.....	B-1-5

TABLE OF AUTHORITIES

PAGE

CASES

United States Supreme Court

Chambers v. Mississippi, 410 U.S. 284
93 St.Ct. 1083, 35 L.Ed 2d 297 (1973)-----4-7

STATEMENT OF THE CASE

On May 27, 1983, the said MARK ANTHONY PARKER was indicted by the Harrison County Grand Jury, for the Second Judicial District for the murder of Darrell Jay Jones, said crime alleged to have occurred on or about April 26, 1983, within the City of Biloxi, Mississippi.

The first trial of Mark Anthony Parker, the Respondent herein, ran from September 26-30, 1983, and ended in the trial judge declaring a mistrial because the jury could not reach a verdict.

The second trial of Mark Anthony Parker ran from May 21-25, 1984, and the jury returned a manslaughter conviction and the trial judge sentenced the Respondent to twenty years in the custody of the Mississippi Department of Corrections, the maximum sentence for said crime.

For the most part the State and Defense called or attempted to call their same witnesses at each trial. Generally speaking, this case and the said trials thereto, basically involved disputes of facts as to the ultimate issue of how the fire that engulfed the car in which Darrell Jay Jones was then occupying started or how was fire ignited, which caused Jones' death.

Shortly after 6:00 p.m., on April 26, 1983, three young blacks, your Respondent, Mark Anthony Parker, T. C. Carter and Carl L. Thompson, travelling in the same car together, had purchased some gas which was placed in a plastic jug held by Parker in the back seat as they drove off. They originally had intended to take this gasoline to a car driven by one of them that had run out of gas down the street a short time earlier.

As the said three young blacks were pulling out of the gasoline station onto Division Street, a car driven by Darrell Jay Jones swerved to miss them. At this point heated obscene words and racial slurs were exchanged by all the parties. Both cars headed east on Division Street for approximately one-half block to the intersection of Division and Caillavet Streets which was controlled by a red light traffic device. As both cars pulled up to the intersection, they caught the red light. While

both cars were waiting for the light to changed, more heated obscene words and racial slurs were further exchanged by these participants. Then Darrell Jay Jones got out of his stopped or parked car and proceeded to go over to the car in which Mark Anthony Parker and the other two blacks were occupying. Jones started throwing punches at Parker through an opened back set window. Parker managed to get out of the car, and in the process lost control of the plastic jug of gasoline that he was holding and started fighting with Jones in the street area at this intersection. In the process of this fighting, Jones, and Parker to a certain extent, became satuated with gasoline. The fighting ended, Jones returned to his car, and Parker and other two blacks were still right there at the scene. Parker was in the general area around the side of the passenger's door of Jones's car. As Jones was attempting to leave the scene a fire engulfed the inside of his car, catching Jones's person on fire. As a result of fire, Jones received severe burns over the vast majority of his body. Sixteen days later, Darrell Jay Jones died as a result of the injuries received from that fire.

The State presented three key fact or eye witnesses, Cheryl Nehlig, Joycelyn Hebert and Billy Ray Ainsworth, to try to establish that Mark Anthony Parker started or actually ignited the fire that killed Darrell Jay Jones.

Only Nehlig and Ainsworth actually testified that they saw some type of match or matches that Parker threw into Jones car. On cross-examination, the exact manner in which Parker was supposed to have started the fire according to these two key State's witnesses was shown to have been mutually exclusive. Joycelyn Hebert, who was in the same position to observe the event as that of her friend and companion of that day Cheryl Nehlig, was unable to testify that she saw any source of ignition supplied by Parker to start or ignite a fire.

Parker testified and denied that he threw a match or book of matches into Jones' car to start the fire. The defense presented several other fact or eye-witnesses to the event to state that although they observed this entire tragic event, they did not see

Parker start any fire as testified to by Nehlig and Ainsworth.

At the first trial, the defense called T. C. Carter to the stand, and questioned him regarding certain statements he had allegedly made after this incident to Alicia Rainey and Timothy Lewis that he (Carter) started the fire. Carter was placed on the stand and denied making the statements. Thereafter, the defense called both Rainey and Lewis to the stand to testify as to the particulars concerning Carter's inculpatory statements made to them and/or in their presence that he (Carter) was responsible for the starting of the fire that killed Jones.

At the second trial, the defense attempted to follow the same procedure on this critical defense testimony. However, T. C. Carter was no longer in the jurisdiction of the court. At the time of the second trial Carter was in Germany, living with relatives, and outside the subpoena power of the Court. The defense did attempt to have a subpoena served upon Carter but to no avail. The defense presented Carter's mother to establish these matters at the second trial. In that Carter was not actually present at the second trial, the trial judge refused the testimony of Alicia Rainey. The defense proffered said testimony into the record. The defense further argued that due to having the former testimony of Carter, under oath, with the same parties to the litigation having had a full opportunity to examine and/or cross-examine him, that the defense should have been able to use that previous sworn testimony of Carter to establish any needed predicate in lieu of actually having T. C. Carter there in person to testify at the second trial. This defense contention was overruled by the trial judge. Therefore, this critical defense testimony was not heard by the jury at the second trial that convicted the Respondent Mark Anthony Parker.

ARGUMENT

Respondent states that the Petitioner's statement of the facts in this case and its argument thereto are misguided or misstated.

At the first trial of the Respondent in this case, the Respondent placed Alicia Rainey on the stand for the sole and only purpose to testifying to the fact that T. C. Carter, one of the young black males that was in the company of the Respondent and at the scene of the fateful fire that led to Darrell Jay Jones' death, had stated to her at a time after this incident that he (T. C. Carter) was responsible for the starting or ignition of that fire. At the first trial, the trial judge would not allow the Respondent to place Alicia Rainey on the stand unless and until the defense had first placed T. C. Carter on the stand to ask him first on direct examination whether he had previously made said statements to Alicia Rainey.

The defense attorneys had previously interviewed T. C. Carter, a juvenile at the time, although he had never been arrested for any of his actions in the death of Mr. Jones, and who prior to the defense interviews had been appointed a lawyer by the court, and well knew then that Carter would deny making the statements to Alicia Rainey if and when he took the stand. Even though the Respondent's trial lawyers and the trial judge basically knew prior to Carter taking the stand that Carter was now going to deny making such statements to Alicia Rainey, it was the trial judge's position that Carter must be given an opportunity of admitting and/or denying said alleged statements upon direct examination before the Respondent's trial lawyers would be allowed to call Alicia Rainey to the stand to contradict him on these inconsistent statements. Certainly, had Carter admitted to making such statements to Alicia Rainey, the evidence would have been before the jury and procedurally and practically, there would have been no need to call Alicia Rainey to the stand. The trial judge's position on this point was something akin to the point that you can't impeach a witness on any alleged prior inconsistent statement made out of court to another person without

first laying the predicate allowing said witness to either admit or deny making said statement on his or her direct examination.

Petitioner states on Page 8, Footnote 2, in its argument to this Court that the Respondent did not attempt to introduce Carter's former testimony at the trial. This assertion of the Petitioner is untrue and clearly established in the trial record for the second trial.

"BY MR. PISARICH: To allow Alicia Rainey to testify in the absence of a third party declarant, that being T. C. Carter who has made a statement against his penal interest and normally--it's this Court's opinion that at the time of the first trial I was required to put T. C. Carter on the stand to ask him if he said the statement and once I elicited the fact that he denied it, then I was in position, according to the Court's ruling to put on the people who heard the statement, but not until such time that I put him on the stand. My situation is different now, in that my third party declarant is unavailable to testify or unavailable to deny. The unique situation that I in is that I can represent to the Court and several other people, that the questions that I propounded to Mr. Carter, Jr., has already been propounded at the first trial under oath and he's denied it. Why should I be stopped from putting on Alicia Rainey." (R-596-7)

Respondent further called Frances Carter, the mother of T. C. Carter, to lay the foundation that he was out of the jurisdiction of the trial court and that he was in Germany at that time. (R-591)(A.-28). Mrs. Carter also testified that she had been served with a subpoena. She further testified that Alicia Rainey had testified at the first trial that her son, T. C. Carter had told her that he had started the fire. (R.-593)(A.-28). The Respondent's reasons for calling Mrs. Carter were many, one was to the effect that the Respondent had now laid the proper predicate to again use the testimony of Alicia Rainey by showing that the defense had taken all reasonable and necessary steps to ensure that T. C. Carter would be present at the second trial.

Furthermore, the Respondent made a full proffer of anticipated testimony of Alicia Rainey at the second trial for full review on appeal, if needed. (see Appendix B, hereto).

Secondly, the Petitioner argues that under Chambers the trial judge should have completely excluded the testimony of Alicia Rainey in that her testimony was not trustworthy enough to be admitted. Your Respondent would urge that the weight and

credibility of any testimony should be left to the trier of fact, the jury. Furthermore, the testimony here to be elicited from Alicia Rainey was just as trustworthy as that declared to be admitted in Chambers.

Your Respondent would further state that at the second trial there was only one witness, Alicia Rainey, available to be put on the stand in contradiction of T. C. Carter. However, your Respondent would strongly urge that at the first trial, the defense not only put on Alicia Rainey but also one Timothy Lewis of Biloxi, Mississippi, who testified to the fact that T. C. Carter had made a statement to him, separate and apart from the one made to Alicia Rainey, after this incident had occurred, that he (T. C. Carter) was responsible for the ignition of the fire that killed Darrell Jay Jones.

Due to the fact that the same trial judge heard both cases, it is your Respondent's position that the trial judge's ruling would not have been solely based by the fact that only Alicia Rainey was in a position to testify at the second trial.

Lastly, the trial judge at the second trial, knew that the following facts before making a decision regarding the issue of allowing the testimony of Alicia Rainey to be presented to the jury, to-wit:

1. That two witnesses, Alicia Rainey and Timothy Lewis had previously testified before him in court, under oath, at the first trial, that T. C. Carter had in fact made such statements to them that he (T. C. Carter) started or ignited the fire.
2. That T. C. Carter was at the scene and about the car of Darrell Jay Jones before it ignited in flames that ultimately engulfed Darrell Jay Jones, killing him.

Your Respondent would strongly disagree with the assertions made by the Petitioner regarding the allegations that link the Respondent and not T. C. Carter with the starting or ignition of the fire killing Mr. Jones. Your Respondent would state the following, to-wit:

1. The exact cause of the fire that ignited in Mr. Jones's car killing him has never been scientifically or technically established at either trial. (It is quite possible that the ultimate ignition or origin of said fire may have been caused in some delayed fashion. The Petitioner fails to tell this Court that the State's two key fact or eye witnesses, Cheryl Nehlig and Billy Ray Ainsworth gave testimony regarding the crucial point

regarding the ignition of the fire that were mutually exclusive. The only other key fact or eye witness for the State, who was standing next to Cheryl Nehlig, was unable to testify that she saw the Respondent actually start the fire.

2. T. C. Carter has given at least two separate statements to two different people implicating himself as the person responsible for starting the fire that killed Mr. Jones.

3. Respondent's assertions that the State's key fact or eyewitnesses, Nehlig and Ainsworth, establish beyond a reasonable doubt that the Respondent was guilty of starting the fire, is an oversimplification of their entire testimony and the testimony of many more other fact or eyewitnesses to this incident who gave contradictory and conflicting testimony to that of Nehlig and Ainsworth.

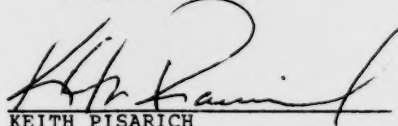
Your Respondent would state that the facts in this case were contradicted by several of the eyewitnesses presented to the jury. This case is just not as simple a matter as the Petitioner would have this Court believe. Certainly, the fact that the first trial ended in a mistrial would tend to show that the evidence available to be presented to the jury could lead reasonable people to differ regarding the ultimate issue of the guilt or innocence of the Respondent. In such a close case such as this, the denial of the trial judge to allow your Respondent to present all of the available evidence in his defense was certainly prejudicial and would require reversal, as so ordered by the Mississippi Supreme Court.

CONCLUSION

For all of the foregoing reasons, your Respondent MARK ANTHONY PARKER, respectfully requests that this Court deny granting the Petitioner State of Mississippi's Petition for a Writ of Certiorari to the Supreme Court of the State of Mississippi.

Respectfully submitted,

MARK ANTHONY PARKER,
Respondent.



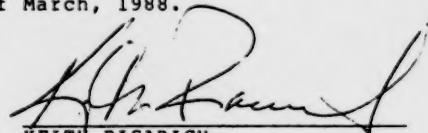
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CERTIFICATE OF SERVICE

I, Keith Pisarich, Attorney for the Respondent MARK ANTHONY PARKER, do hereby certify that prior to filing the foregoing or immediately thereafter, I have caused to be delivered a true and correct copy of the Respondent's Brief in Opposition to the State of Mississippi's Petition for a Writ of Certiorari to the Supreme Court of the State of Mississippi, with the accompany Appendices A & B, Affidavit of Mailing and Appearance Form, by way of United States mail, postage prepaid, and correctly addressed to the Hon. Wayne Snuggs, Assistant Attorney General for the State of Mississippi, at P. O. Box 220, Jackson, Mississippi 39205-0220, and further did hand-deliver a copy of same to the Hon. Glenn Cannon, District Attorney for the Second Circuit Court District for the State of Mississippi, at his offices located in the Harrison County Courthouse, Second Judicial District, Biloxi, Mississippi.

Done, this the 24th day of March, 1988.



KEITH PISARICH
Attorney for the Respondent

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE STATE OF MISSISSIPPI,

Petitioner,

versus

MARK ANTHONY PARKER,

Respondent.

AFFIDAVIT OF FILING BY EXPRESS COURIER AND/OR MAIL

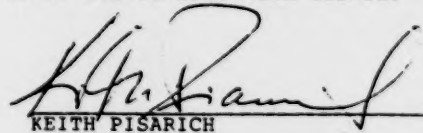
STATE OF MISSISSIPPI)

:SS.:

COUNTY OF HARRISON)

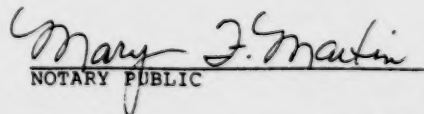
KEITH PISARICH, being duly sworn, states:

1. That I am a member of the Bar of this Court.
2. That on March 24th, 1988, I caused to be delivered by private express courier, with guaranteed overnight delivery by March 25, 1988, at 10:00 a.m., ten (10) copies of the Respondent's Brief in Opposition to Petitioner's Petition for a Writ of Certiorari in the above reference case properly addressed to the Clerk of this Court.
3. All parties required to be served have been served.


KEITH PISARICH

SWORN TO AND SUBSCRIBED BEFORE ME, this, the 24th day of March, 1988.




NOTARY PUBLIC

My Commission Expires:

9/25/91

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APPENDIX
TO
RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEY FOR THE RESPONDENT

APPENDIX A:

The complete trial transcript of witness ALICIA RAINEY taken at the first trial of MARK ANTHONY PARKER conducted September 26, 1983 through September 30, 1983.

ALICIA RAINEY, Having been called as a witness on behalf of the Defendant and after being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. PISARICH:

Q. Would you state your name, please?

A. Alicia Denise Rainey.

Q. How old are you?

A. Fifteen.

Q. Where do you live?

A. 88 East End Homes?

Q. Whom do you live there with?

A. My mother.

Q. Your mother's name?

A. Lorraine Rainey.

Q. Do you know T.C. Carter?

A. Yes, I do.

Q. Now, how long have you been knowing him?

A. I guess all of my life.

Q. Are you related to him?

A. Yes, first cousin.

Q. That would be how in reference to the mother and father situation?

A. My father and his mother were brothers and sisters.

Q. Now, you know the incident that took place or heard about the incident that took place on April 26th, 1983 at the corner of Caillavet and Division?

A. Yes.

Q. Now, did you see Mr. Carter and talk with Mr. T.C. Carter after this incident?

A. Yes.

Q. Specifically, on or about May 7th, at the West Community---

A. East Division Street.

Q. East Division Community Center in Biloxi?

A. Uh, hum.

Q. Do you recall seeing him there?

A. Yes.

Q. And, what was the social event?

A. Well, what do you mean by that.

Q. What type of an event were y'all having?

A. It was a dance.

Q. Was anyone else present at the time that you had the conversation with Mr. Carter?

A. Yes, there was a lot of people.

Q. Would you relate, if anything, regarding this incident that took place on the 26th in which a fire occurred in Mr. Jones' car. Did he tell you anything about that?

A. Yes.

Q. What did Mr. T.C. Carter tell you?

A. Well, I asked him what did he have to do with it and first he didn't say anything and then he told me that he dropped the match and ran in front of Church's Chicken and then he said that he looked back and he just stood there; and that's what he told me.

Q. What else did he tell you?

A. He told me that he was about to light a joint.

Q. And, what else?

A. And, that--I asked him what was Mark doing and he said that Mark was fighting and I asked him what was Karl doing and he didn't say anything at first and then he told me that Karl had the gas can.

Q. What else did he tell you?

A. Everybody was calling him the flamethrower and he hollered out real loud, don't call him the flamethrower, call him the destroyer?

Q. Was there anything else in the conversation?

A. No, not really.

Q. Have you talked to him since then?

A. No.

Q. Where do you go to school at?

A. Fernwood Junior High.

Q. What grade are you in?

A. Nineth.

Q. Can you recall anything else about the conversation?

A. No.

Q. Getting back to the first part, he stated that he did what as far as the match?

A. He said that he dropped the match and ran in front of Church's.

BY MR. PISARICH: No further questions.

BY MR. JOHNSON: I have no questions.

APPENDIX B:

The complete trial transcript of witness ALICIA RAINEY proffered at the second trial of MARK ANTHONY PARKER conducted May 21, 1984 through May 25, 1984.

ALICIA RAINEY, Having been called as a witness on behalf of the Defendant and after being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. PISARICH:

Q. Would you state your name, please?

A. Alicia Rainey.

Q. How old are you?

A. Fifteen.

Q. At the time of this incident back in April 26, 1983 how old were you then?

A. Fourteen.

Q. Do you know T.C. Carter Jr.?

A. Yes, I do.

Q. How old is he?

A. He is fourteen.

Q. Would you describe him?

A. He is short, he got low cut hair, he is short, okay low cut hair, got brown sort of eyes, looking like.

Q. Is he a young black male?

A. Yes.

Q. In reference as to State's Exhibit 25, can you identify that man?

A. That's T.C.

Q. T.C. Carter Jr. Do you recall an incident wherein a man died as a result of a fire, a white man died of a result of a fire on April 26, 1983, at the corner of Division and Caillavet Streets about 6:30 p.m., do you recall that incident?

A. I know about it.

Q. You heard about it?

A. Uh, hum.

Q. You weren't present?

A. No, I wasn't.

Q. Did you have an occasion subsequent to that time, to hear T.C. Carter Jr. make any statements relative to that issue?

A. Yes.

Q. When was this that you heard it?

A. It is was March 7th at a dance on Division Street Community Center.

Q. At what time?

A. March 7th.

Q. Are you sure it was March?

A. Yes.

Q. Do you recall giving an affidavit in reference to this particular statements?

A. No.

Q. Do you know March 7th is before the time of the incident?

A. Uh, hum.

Q. Do you recall what the gest or what the statement was that T.C. Carter made to you?

A. I asked him about what had happened because I had heard a lot of things about it. I asked him and he said that Mark was fighting with somebody and then I asked him what did him and Karl have to do with it, he said they got out of the car, he said Karl had a gas--a jug with gas and I asked what did he do, he said he dropped the match and ran in front of Church's Chicken. He said he was about to light a joint and he dropped the match and ran in front of Church's Chicken then he said, "The mother fucker should have died because he slapped him", and everybody was calling him the flamethrower, he hollered out "Don't call me the flamethrower, call me the destroyer."

Q. Is that what you heard him say?

A. He was talking to me.

BY MR. PISARICH: That's what we would proffer and offer as proof if this witness were allowed to testify.

BY THE COURT: If I understand the witness correctly, that Karl Thompson dropped the match?

A. T.C. Carter. I asked him what he had to do with and I asked him what Karl had to do with it and he said, Karl had a jug with gas in it.

Q. And then what happened?

A. He said he was going to light a match and he dropped the match--he was going to light a joint, he said he dropped the match.

Q. When he said he was going to light a joint, he wasn't talking about Karl Thompson?

A. He said he was going to light a joint.

BY THE COURT: Do you have any cross-examination of the proffer.

CROSS EXAMINATION

BY MR. COMPRETTE:

Q. When he said he was going to light the joint, did he say he and Karl were across by Church's watching the fight?

A. No, he didn't.

Q. Did he say where he was?

A. He said that--all he told me was he was going to light a joint and he dropped the match and ran in front of Church's, that's all.

Q. He didn't tell you anything about the fight or fire?

A. No, he just said that--he told me that he should have died and all this kind of mess and I asked him what was Mark doing, and he said Mark was fighting.

Q. He said the man should have died because he hit him?

A. Uh, hum.

Q. Did T.C. tell you that he was the one that lit the fire?

A. Yes, he did.

Q. You didn't tell that on direct testimony?

A. I told him that he said he dropped the match.

Q. You didn't say he lit the fire, you said he dropped the match and ran?

A. Well, he said he did--what he was saying--

Q. Not what he was saying, what did he say?

BY MR. TISDALE: Judge, he is being argumentative with the witness.

BY THE COURT: Overruled.

Q. What he said, not what you think he was trying to say?

A. He told me that he dropped the match and in other words--

Q. No, no, not other words---

A. He was saying that he lit it---

BY THE COURT: It's not what you think he was saying, but what you remember, just tell us what you remember?

A. He said he dropped the match.

Q. That's what I want to know. He was lighting a joint?

A. Yes.

Q. March 7th, what year?

A. Last year.

Q. March 7th of last year?

A. Yes, it was.

Q. At a dance?

A. Yes, it was.

Q. No doubt in your mind?

A. It was at a dance.

Q. March 7th?

A. That's what I said.

Q. That's what I want to make sure.

BY MR. PISARICH: Nothing.

BY THE COURT: I feel the circumstances are different and I think the exception to the penal interest on hearsay is and could

be used in that limited exception only and it's not before Court at this time and I overrule the motion to proffer that testimony in the presence of the Jury, for those reasons and other reasons, they would be too numerous to mention here.

BY MR. PISARICH: It was my understanding at the last trial and from what I can remember as to the procedure, I was only allowed to ask him, as far as other than his name, only allowed to ask him one question.

BY THE COURT: The State at that time had the opportunity to cross examine him and reveal what credibility, if any, that they could give to his statement of denying it.